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Schmieg, Evita

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Human Rights and Sustainability in Free Trade Agreements

Can the Cariforum-EU Economic Partnership Agreement Serve as a Model?

Evita Schmieg

The liberalisation of foreign trade has often contributed to stimulating development and increasing prosperity. But it can also lead to unemployment, environmental problems and threats to food security. Free trade agreements should therefore be designed to ensure that positive effects are felt quickly, and provisions should be made for dealing with negative effects. In recent years the European Union and the United States have already concluded free trade agreements containing clauses on sustainability and human rights backed up with instruments for impact assessment and monitoring. The European Union's Economic Partnership Agreement with Cariforum contains formulations that could serve as a model in this respect.

In recent years free trade negotiations have been increasingly accompanied by demands to take greater account of human rights aspects, because trade liberalisation demonstrable does not *automatically* reduce poverty and improve standards of living in the countries involved. In fact there are numerous cases where the consequences of liberalisation threaten existences and violate human rights. Although classical economics asserts that free trade fundamentally improves the situation of all countries and thus creates the basis for rising prosperity everywhere. These results originate from theoretical models that assume zero unemployment and full utilisation of all production factors; that condition is met

virtually nowhere, and least of all in developing countries.

The EU's Economic Partnership Agreement (EPA) with the Caribbean Forum (Cariforum), which came into force in 2008, contains numerous provisions relating to aspects of sustainability and human rights. The Cariforum EPA is especially interesting because it explicitly pursues the overarching objective of sustainable development. Both the European Union's negotiations over Economic Partnership Agreements with African, Caribbean and Pacific (ACP) states and the implementation of concluded EPAs are closely flanked by development measures. This is one outcome of the Cotonou Agreement between the European

Dr. Evita Schmieg is an Associate in SWP's EU External Relations Division

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Union and the ACP states, whose specific character is based on the European Union's close relations with the former colonies of its member-states.

Starting Points for Human Rights in Free Trade Agreements

There are three fundamental starting points for anchoring human rights in free trade agreements. First of all, there can be an *ex ante examination* of the economic and social impacts and the expected consequences of an agreement for the human rights situation in the involved countries. Such a Human Rights Impact Assessment (HRIA) has been proposed by the UN Special Rapporteur on the Right to Food, Olivier de Schutter, and received a great deal of support from human rights organisations. According to de Schutter, HRIAs should satisfy the following criteria: 1. Independence: The HRIA should be prepared by an institution that is independent of the negotiating executives. 2. Transparency: The HRIA should be based on unambiguous methodology and publicly accessible data. 3. Inclusivity: Broad public participation, in particular by affected groups, should be sought during the preparation of the HRIA. 4. Resources: Sufficient expertise and funding should be provided to match the high standards required. 5. Status: The results of the study should be fed appropriately into the decision-making process, ideally through a thorough parliamentary debate.

Once such a comprehensive, objective assessment is available, the agreement can be adjusted to maximise positive impacts and minimise the negative.

Two main concerns are associated with free trade agreements. On the one hand a liberalisation of trade can lead to the displacement of local production, and thus cause unemployment and social problems. To cite one example from the sphere of agriculture, competition sharpened by free trade can increase rural unemployment, threaten the food security of the rural

population and cause migration to the cities. If these risks have been assessed in advance, appropriate exceptions can be made for agriculture and/or appropriate transitional periods and accompanying measures agreed.

It is the responsibility of the state to fulfil its human rights obligations and take action to protect vulnerable groups, secure the food supply, improve social welfare, and so on. Trade agreements must not impinge upon the state's ability to do so. The second central concern is therefore that free trade agreements excessively restrict governments' policy space and make it impossible for them to fulfil their human rights obligations. So trade agreements must avoid generating a threat to state revenues, for example if import duties are suddenly lost.

Whether the state actually uses its policy space for the benefit of the population is a different question, and one that no HRIA can answer. Fundamentally the risk of problematic effects is greater in countries whose governments fail to accompany economic adjustments with supporting measures or are already unable to provide adequate social protection.

Impact assessment instruments for free trade agreements already exist. The EU Commission conducts Sustainability Impact Assessments (SIAs) for all planned free trade agreements. But only the more recent SIAs contain explicit reference to human rights as discussed in the UN context, although some older ones do at least implicitly cover human rights questions.

The second starting point for including human rights aspects in free trade agreement is the *regulation of human rights in the agreement texts* themselves. Such material provisions can ensure that human rights are not harmed by the effects of the agreement, especially the consequences of trade liberalisation, but instead actually improved where possible. The inclusion of social rights, specifically the core labour standards of the International Labour Organisation (ILO), is regarded as essential in order to

avoid the burden of heightened competition (produced by the agreement) being borne by labour and employment. Other social rights can also be affected by free trade agreements. Rules for foreign trade and direct investment can have immediate repercussions on the individual's right to food, housing, healthcare, education and social security. Such impacts must be examined during trade negotiations, and provisions averting negative consequences included directly in the agreements.

The third starting point would be *ex post impact monitoring* after free trade agreements come into effect, and the development of instruments capable of adjusting or compensating negative effects. Some existing agreements already contain such provisions (for example so-called safeguard clauses, see below). But the proponents of the human rights approach call for more incisive instruments, arguing that there should always be monitoring of implementation to enable a fast and flexible response where human rights are threatened. Such monitoring could also trigger automatic suspension of particular clauses.

There is no internationally agreed methodology for measuring the impacts of free trade agreements. The "Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements" presented by Olivier de Schutter, UN Special Rapporteur on the Right to Food, which have not been adopted by the United Nations, indicate ways the negotiating states could fulfil their duty to ensure that free trade agreements respect human rights and associated obligations.

The Cariforum EPA Impact Assessment

The EU's Economic Partnership Agreements with the ACP states have been subjected to Sustainability Impact Assessments (SIAs). The final reports call for: 1. promoting regional integration through the agreements; 2. opening the European Union's markets to the ACP states more quickly

and comprehensively, including through more generous rules of origin; 3. restricting the market opening of the ACP states (to 80 percent of trade) and excluding sensitive products where imports from the European Union could displace local production (including wheat, beef and poultry).

The importance of efficient policies and institutions and the special role played by development cooperation is often underlined in connection with the ecological and social aspects of sustainability. As well as the economic actors, a range of groups in society must be included in order to comprehend the full breadth of impacts of an agreement, including the social and ecological.

However, the impact assessment for the Cariforum EPA only partially meets the criteria for a Human Rights Impact Assessment (HRIA). On the positive side, it was prepared (a) by independent institutions or consulting firms using (b) transparent methods. There was also (c) broad participation by groups affected by the agreement (including the local population), as stipulated in the EU Commission's "Handbook for Trade Sustainability Impact Assessment". Also on the positive side, the Caribbean Regional Negotiating Machinery (CRNM) conducted extensive consultation processes in the Cariforum member-states, above all to clarify which sensitive products should be excluded from liberalisation. The requirement of expertise and funding (d) was also fulfilled. But as far as status (e) is concerned, there are grounds to doubt that the final report played a major role. Under the requirements for an HRIA, the study should have been discussed in the European Parliament and in the national parliaments and should have played a central role in the decision-making processes in the Commission and the European Council. Although the Commission's comments on the impact assessment state that it found all the recommendations useful and intended to implement them, at least in the European Council working groups there was no broader discussion

about the expected impacts and the ensuing consequences for the agreement (for example with respect to the question of export taxes). Interest in the impact assessments commissioned by the EU Commission for other free trade agreements also remains very limited.

From the human rights perspective, this type of impact assessment is also unsatisfactory in terms of its scope, as it covers only questions of sustainability without a comprehensive analysis of how human rights are affected by the agreement. Social and ecological aspects are supplemental add-ons to a largely economic perspective rather than the central focus. The social and ecological recommendations relate to minor individual points (frequently development cooperation) whereas the human rights approach demands that the entire structure and content of the agreement be shaped by human rights requirements, with the latter granted a comprehensive normative function. Moreover, the Cariforum SIA relates only to impacts within the Caribbean states, whereas an HRIA sets out to investigate ex ante the impacts in all participating countries, and would in this case also include the member-states of the European Union.

The SIA for the Cariforum EPA is one of the first impact assessments conducted by the European Union in preparation for a free trade agreement. The debate about the human rights implications of such agreements contributed to the European Union broadening its approach to impact assessments (SIAs) in 2009. Since then its SIAs (for example for the trade agreement with Morocco) also contain a human rights chapter. But they still fall short of the normative standards of the HRIA concept.

Human Rights and the Cariforum EPA Framework

Because the Cariforum EPA is supposed to serve the headline goal of sustainable development, ideas about human rights impacts are implicitly reflected in numerous provi-

sions dealing with questions of environmental and social standards and development.

Asymmetrical Liberalisation

The agreement demands a considerably less far-reaching market opening by the Caribbean partners than the European Union grants to them in return. Whereas the European Union granted the Cariforum countries fully duty- and quota-free market access from 1 January 2008, the Cariforum states will for a very long period (twenty-five years) have to liberalise only 86.9 percent of their imports from the European Union; 13.1 percent of trade remains permanently excluded from liberalisation in order to protect sensitive sectors. The Caribbean Regional Negotiating Mechanism (CRNM) also emphasises that great time and effort was put into the process of defining the sensitive products to be excluded.

Preserving Policy Space

The partner countries also retain a broad policy space in particular spheres:

The Cariforum EPA explicitly includes the right of parties to legislate to tighten environmental and social standards (Article 192). Article 27 (4) provides an exception from the national treatment principle, by permitting the payment of subsidies exclusively to domestic producers and thus preserving the possibility to pursue national economic policy goals. The loss of customs revenues through the agreement also remains small; only in the case of Guyana and Surinam will it exceed 1 percent over a twenty-five-year period.

The safeguard clause (Article 25) is also formulated exceptionally flexibly. Every free trade agreement contains such a clause permitting the reintroduction of customs duties in sectors where imports would lead to “serious injury”, as the WTO terminology puts it, to domestic production. The Cariforum EPA permits the parties to invoke

the safeguard clause already for less severe problems, including “disturbances in the markets of like or directly competitive agricultural products” and “disturbances to an infant industry” that is not yet competitive. These relatively vague formulations allow the safeguard clause to be invoked considerably more easily than under WTO rules.

With respect to customs duties on exports, however, Cariforum has signed away its policy space. Article 14 basically prohibits customs duties on products exported to the European Union. In the ongoing EPA talks with the African ACP states, precisely this question has emerged as a central sticking point, because export taxes on African raw materials have played an important role in the development of national value chains. Cariforum, however, continues to regard the arrangement as unproblematic.

Monitoring of Implementation

A *monitoring procedure* is provided to ensure that negative effects of the EPA are identified early enough for countermeasures to be applied. The type of problem concerned might be a deterioration of the food supply through the displacement of local production, output contractions or an increase in unemployment. The parties agree to such a form of monitoring in Article 5 and at several other points relating to specific areas (for example environment in Article 189). The level of involvement of civil society in the Cariforum-EU institutions is unusually broad, with a Consultative Committee drawing its membership from “representatives of organisations of civil society, including the academic community, and social and economic partners” (Article 232). The Consultative Committee possesses a very broad mandate and can act on its own initiative to prepare recommendations to the Joint Cariforum-EC Council, the highest body created by the agreement. If this provision is taken seriously it could prove to be a very effective instrument for monitoring human rights in the implementation of the agreement.

The cited examples demonstrate that the Cariforum EPA demands less liberalisation on the part of the Caribbean trading partners and leaves them greater policy space than other free trade agreements or WTO rules. However it remains a matter of opinion whether the outlined arrangements do enough for human rights. Proponents of the human rights approach would probably say it does not, because they fundamentally doubt that free trade agreements can contribute to improving the human rights situation. Whereas Sustainability Impact Assessments are concerned only with impacts within a predefined “free trade agreement” option, a Human Rights Impact Assessment (HRIA) is expected to investigate different policy options to maximise the positive effects on human rights.

Human Rights Clauses in the Cariforum EPA

The term “human rights” stands only in the preamble of the Cariforum EPA, which refers to them as “the essential elements” of the Cotonou Agreement. But Article 3 (“Sustainable development”) includes the commitment by the parties that “the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations”.

Although that is not identical with a substantial anchoring of human rights, the formulation does offer important points of reference for addressing possible disputes.

Certain human rights are in fact anchored in concrete formulations:

In relation to foreign direct investment, Article 72 (d), calls for “local community liaison processes, especially in projects involving extensive natural resource-based activities”, although only to the extent that the interests of the other party are not impaired (!). Foreign direct investment must not be attracted by reducing environmental or social standards (Article 73, similar 193), and the parties and signatories “commit to

not adopting or applying regional or national trade or investment-related legislation or other related administrative measures as the case may be in a way which has the effect of frustrating measures intended to benefit, protect or conserve the environment or natural resources or to protect public health” (Article 188).

A series of provisions deal in detail with social and labour standards. Article 191 reaffirms the ILO core labour standards, the declaration on full employment and decent work, the importance of employment and social policies, and the principle that “labour standards should not be used for protectionist trade purposes”. Article 192 underlines the right of the signatories to regulate their own social and labour standards and calls for further improvements in this field. Existing protections should not be lowered (Article 193). While these provisions anchor labour standards quite firmly in the agreement, the consultation and monitoring mechanisms provided in Article 195 are crucial for the actual effectiveness of the clauses. In the event of problems arising, the parties may arrange consultations, seek advice from the ILO or request the convening of an independent committee of experts.

The labour and environment chapters of the Cariforum EPA are thus integrated in the disputes procedures, and the labour rights clauses are underpinned by sanctions. Even though these arrangements are very far-reaching in comparison to other EU free trade agreements, higher standards would still be conceivable. The United States in particular has placed conditions on ratification in certain cases (for example agreements with Oman, Panama, Bahrain and Morocco) and in that way achieved legal reforms strengthening labour and trade union rights in partner countries before the agreements even came into force.

Conclusions

Room for improvement in EU impact assessment (SIA) methods

Earlier free trade agreements and the impact assessments prepared in advance of them take human rights into account to a lesser extent than would be possible using the latest methods, and possibly also to a lesser extent than politically desired within society. Fundamentally, questions of human rights need to be more strongly reflected in SIAs. The EU impact assessment guidelines need to be made much more explicit on this point. But for several reasons it would not appear opportune to entirely replace SIAs with a human rights approach: 1. The pragmatic approach of concretely improving the existing and utilised SIA instrument would be easy to realise, while the human rights approach is not yet a mature concept and there is no consensus about how it might function. 2. There are good grounds to regulate human rights questions within the specific context by inserting precise statements on labour standards, investor obligations, etc. in the agreement texts, rather than by means of general human rights clauses. General formulations can potentially leave room for dispute over the extent to which they apply to labour and environmental standards. Even on the ILO core labour standards, there is no overarching consensus. Moreover, environmental questions as such are not covered by a human rights clause, or only circuitously via the environmental impact on human populations. The concept of sustainability, on the other hand, is based overtly on three pillars (four if, as is increasingly the case, the political dimension is also included alongside the economic, ecological and social), where it is assumed that sustainable development is only possible if *all* these pillars are taken account of. Of course such a broad approach means that conflicts of goals are more likely to occur (for example between human rights and environmental questions). The resolution of such problems would then have to be tackled through an

inclusive and democratic decision-making process.

Formulations from the Cariforum EPA could serve as models

It is not only its asymmetrical liberalisation that demonstrates the aim of the Cariforum EPA to contribute to sustainable development in the Caribbean partner countries. That objective has led de facto to a relatively broad-based anchoring of human rights aspects in the agreement, even though the preparatory SIA contained comparatively few pointers. The far-reaching formulations it contains on preserving policy space, obligations for investors to respect the interests of third parties, and questions of sustainability serve the goals of protection and promotion of human rights and certainly possess model character for other free trade agreements. The agreement's monitoring provisions are particularly far-reaching, granting a strong role to affected groups and especially civil society. In the event of human rights violations occurring, it is important that such systems also lead to real action being taken or provisions of the agreement being suspended (for example liberalisation steps). Further experience needs to be gathered here.

Deep involvement of stakeholders

The systematic consideration of human rights aspects in free trade agreement requires involving affected groups in preparation, negotiation and implementation. That is indeed foreseen in the European Union's SIAs, although only for the partner countries. Those affected know best where their (human) rights are affected, and their inclusion in the negotiating process is therefore indispensable. It can ensure that important concerns are actually regulated in the agreement. The impact assessment studies themselves can provide important input for the discussion, but they are a snapshot that ultimately reflects the opinion of their authors rather than the objective reality. Moreover, the longer the negotiations last, the greater the danger that the

findings will no longer reflect the reality. It must also be remembered that institutional memory may be limited, especially where staff turnover is high. SIAs and HRIAs can therefore represent an important source of information – but their relevance should not be overestimated in comparison to the centrality of ongoing inclusion of stakeholders in the negotiating process.

Empowerment is crucial

The effective inclusion of groups affected by a free trade agreement presupposes that they possess both the necessary information to judge the agreement in question and the capacity to participate in a discussion process. These are not automatically given but must be ensured in the process of preparing, negotiating and implementing free trade agreements if aspects of sustainability and human rights are to be adequately taken into account. Adequate time and resources need to be allowed. Development policy can play a supporting role here.

Free trade agreements are compromises

In the European Union there is a broad consensus that principles of sustainability and human rights protection should be addressed in modern, comprehensive trade agreements. But even within the European discussion there are widely differing perspectives on the form in which this should occur. African negotiating partners, on the other hand, generally reject out of hand any suggestion of including human rights in free trade agreements, and in recent talks over the Economic Partnership Agreement with sub-Saharan Africa the human rights clause has proven extremely controversial. The question of the extent to which human rights aspects can be explicitly included in agreements must therefore be resolved politically by the negotiating parties. The pragmatic formulation of sustainability requirements may be difficult, but is not quite so highly charged politically. The formulations will be different in every agreement. But it is always important

that there be a political assessment of what this means concretely for the people in the countries concerned, and that concrete improvements are achieved.

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SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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